UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED NURSES & ALLIED PROFESSIONAL S (Kent Hospital) and JEANETTE GEARY, an individual.	Case 1-CB-11135

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STATEMENT OF THE CASE AND AMICUS CURIAE POSITION

This Case is before the National Labor Relations Board ("the Board") on Exceptions filed by the Acting General Counsel and the Charging Party. On December 14, 2012, the Board issued a Decision and Order finding that the Respondent Union did not violate the National Labor Relations Act ("the Act") by failing to provide the Charging Party, a nonmember objector, with an audit verification letter. The Board also found that the Union lawfully charged the Charging Party for expenses the Union incurred while lobbying for bills pending in the Rhode Island and Vermont legislatures because the lobbying expenses were chargeable to objectors to the extent that they are germane to collective bargaining, contract administration, or grievance adjustment. The Board even found extra-unit lobbying activities chargeable, provided the charges are reciprocal in nature. United Nurses & Allied Prof. (Kent Hospital), 359 NLRB No. 42 (2012). The Board invited briefing to provide parties and amici an opportunity to address the extent to which lobbying expenses are germane for the purposes of chargeability. Kent Hospital, 359 NLRB No. 42, slip op. at 1.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million workers, contributes more than $1.6 trillion to the United States economy annually, and is the largest driver of economic growth in the nation.

The NAM is a powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers create jobs. The NAM is on the front lines of labor relations policy and works on behalf of American manufacturers to advance policies that create

economic strength and jobs and encourage the expansion of manufacturing in the United States. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. The NAM submits this amicus brief because lobbying expenses directly relate to NAM's members' interests in labor relations policies in the manufacturing sector.

SUMMARY OF ARGUMENT

The Board should overturn, or withdraw its decision, in United Nurses & Allied Prof. (Kent Hospital), and refrain from issuing a supplemental decision, because the Board lacks a legal quorum under Noel Canning v. N.L.R.B., ___ F.3d ___, No. 12-1115, 2013 WL 276024 (D.C. Cir. 2013) and New Process Steel, L.P. v. N.L.R.B., 130 S.Ct. 2635 (2010). The Board's decision in Kent Hospital destroys nonmember objecting employees' Beck rights to choose not to contribute dues to the union's political and ideological causes. *See* Communications Workers of America v. Beck, 485 U.S. 735 (1988). The decision runs contrary to the National Labor Relations Act, the union's duty of fair representation, and most importantly, the First Amendment of the United States' Constitution. 29 U.S.C §§151-169; U.S. Const. Amend. I. Under the First Amendment, unions should never be permitted to collect any fees for lobbying, or any purposes unrelated to collective bargaining, unless an employee opts in on an annual basis. The Board further eroded objecting nonmembers' Beck rights by creating an evidentiary presumption in favor of the chargeability of union lobbying expenses and placing the burden on the dissenting employee to show the expenses were not germane to the union's collective bargaining function. The Board created an additional obligation requiring dissenting employees

to fund the union's nationwide lobbying expenses that are completely unrelated to the local union's interest. Finally, NAM urges the Board to require unions to provide nonmember objectors with audit verification letters to ensure that the dissenting employee receives reliable, certified information. In fact, the Board should institute more stringent procedural standards and notice requirements to protect all members' rights to object to nonrepresentational costs, including requiring unions to provide certified annual financial statements to protect all members.

ARGUMENT

I. THE BOARD LACKS A LEGAL QUORUM, AND THE MEMBERS LACK THE LAWFUL POWER, TO AMELIORATE EMPLOYEE *BECK* RIGHTS.

The Board possesses no legal authority to find lobbying a chargeable expense to objecting nonmembers, to create a new presumption in favor of the chargeability of union lobbying expenses, or to determine that the union did not violate the Act by failing to provide the Charging Party, a nonmember objector, with an audit verification letter. This case is currently pending before Chairman Pearce and Members Block and Griffin. The U.S. Court of Appeals for the D.C. Circuit found that President Obama's January 2012 recess appointments of Members Griffin and Block were unconstitutional. Noel Canning v. N.L.R.B., ___ F.3d ___, No. 12-1115, 2013 WL 276024 (D.C. Cir. 2013). The Court held that Chairman Pearce and Members Block and Griffin did not constitute a lawful Board. The Board must have a quorum of at least three members. Only Chairman Pearce was lawfully appointed to the Board. Therefore, Chairman Pearce and Members Block and Griffin possess no authority to issue any order. Noel Canning, slip op. at 12-13 (citing New Process Steel, L.P. v. N.L.R.B., 130 S.Ct. 2635 (2010)). The Board lacks the authority to issue the original order in this case, or issue a supplemental

order after receiving the parties' and amicus briefs.[1] The NAM respectfully requests that the Board acknowledge the invalidity of its order in the Kent Hospital case under New Process Steel. *See* New Process Steel, L.P. v. N.L.R.B., 130 S.Ct. 2635 (2010).

II. THE BOARD'S DECISION, CREATING CHARGEABLE LOBBYING EXPENSES FOR NONMEMBER OBJECTORS, DESTROYS THE DISSENTING EMPLOYEES' *BECK* RIGHTS.

The Board's decision that unions may charge objectors lobbying fees directly contradicts the Supreme Court's decision in Communications Workers of America v. Beck, 485 U.S. 735 (1988). In Beck, the Supreme Court addressed the collection of agency fees, beyond those necessary to finance collective bargaining. Section 8(a)(3) of the National Labor Relations Act permits an employer and a union to enter into an agreement requiring all employees to become union members as a condition of continued employment, whether or not employees wish to do so. 29 U.S.C. §158(a)(3). Beck, 485 U.S. at 738. Beck reviewed the issue of whether Section 8(a)(3) permits a union, over the objections of dues-paying nonmember employees, to expend funds on activities unrelated to collective bargaining, contract administration or grievance administration, under the union's duty of fair representation and objecting employees' First Amendment rights.

As the exclusive representative, the Union maintains broad authority in the negotiation and administration of the collective bargaining contract. This broad authority is tempered by the union's statutory obligation to serve the interests of all members without hostility or discrimination toward any. That duty extends to the subsequent enforcement of the agreement. Communications Workers of America v. Beck, 485 U.S. at 739 (citing Vaca v. Snipes, 386 U.S.

[1] The Charging Party seeks to overturn the Board's decision on constitutional and quorum grounds. The Charging Party filed a Petition for Writ of Mandamus or Writ of Prohibition to Compel the National Labor Relations Board to Cease Adjudicating or Deciding Petitioner's Case on February 11, 2013.

171, 177 (1967)). The union membership that may be required has been whittled down to its financial core. 29 U.S.C. §158(a)(3); Beck, 487 U.S. at 745 (citing N.L.R.B. v. General Motors Corp., 373 U.S. 734 (1963)). The financial core does not include any obligation to support union activities beyond those germane to collective bargaining, contract administration and grievance adjustment. Id.

The Supreme Court specifically delineated lobbying as unrelated to collective bargaining or contract negotiation. The Court exhaustively reviewed the legislative history of the NLRA and the Railway Labor Act ("RLA"). Under the RLA, the Court clearly found that a union, over the objections of nonmembers, cannot compel the use of agency fees on political causes. The Supreme Court considers the RLA and NLRA "statutory equivalents" regarding section 8(a)(3). Beck, 487 U.S. at 743 (citing Ellis v. Railway Clerks, 466 U.S. 435 (1984)); California Saw & Knife Works, 320 NLRB 224, 225 (1995). Therefore, the Board has no authority to compel the use of agency fees on political causes under the NLRA.

Beck created a bright line rule excluding lobbying under the NLRA as a chargeable expense to non-member objectors. The Board's decision declaring lobbying expenses chargeable, to the extent they are germane to collective bargaining, oversteps the Board's authority. The Board acted contrary to the Court's statutory and constitutional interpretation and its order must be overturned. Yellow Taxi Co. v. N.L.R.B., 721 F.2d 366, 382-83 (D.C. Cir. 1983). The Board's decision forces objecting employees to support the union's political causes. Congress never intended "to provide unions with a means for forcing employees, over their objection, to support political causes which they oppose." Beck, 487 U.S. at 751 (citing Machinists v. Street, 367 U.S. 740, 764 (1961)). The Board's decision that lobbying expenses are chargeable unlawfully limits objecting employees' Beck rights.

Although the Supreme Court never specifically imposed the First Amendment test on the NLRA, the NLRA's statutory duty of fair representation carries no fewer procedural obligations than the constitutional duty. Miller v. Air Line Pilots Ass'n, 108 F.3d 1415, 1419 (D.C. Cir. 1997), *aff'd,* 523 U.S. 866. The duty of fair representation requires the Board to balance the constitutionally and statutorily protected individual and collective interests the Supreme Court articulated in the unfair representation area. California Saw, 320 NLRB at 230.

The Board ignores individual rights completely and notes that "constitutional concerns are not relevant" to invent a less stringent standard under the duty of fair representation. Kent Hospital, 359 NLRB No. 42, slip op. at 7. The Board focuses on the lack of governmental action in the private sector labor relationship as justification for ignoring the objectors' First Amendment rights. Beck's analysis derives from a reading of the statute and is not dependent on whether the "negotiation of union security agreements under the NLRA partakes of governmental action." Beck, 487 U.S. at 762. Employees' free speech rights are no less important in the private sector. The RLA involves private sector employees. The courts, and the Board, should uniformly apply the First Amendment's strict scrutiny to cases under the NLRA, as well as RLA cases, because the statutory framework of the NLRA and RLA are "statutory equivalents." Beck, 487 U.S. at 743 (citing Ellis v. Railway Clerks, 466 U.S. 435).

No rationale supports exempting employees covered by the NLRA from the same constitutional protections offered to public sector and RLA employees. The First Amendment free speech protections apply equally to all employees covered by the RLA, the NLRA and the public sector. The free speech concerns do not rest on whether "state action" exists. Beck, 487 U.S. at 762. The Board misplaces the focus on state action and away from the infringement on nonmembers' First Amendment rights inherent in the forced membership of an agency shop.

A survey of Supreme Court cases shows the Board cannot ignore objecting employees' free speech rights in the private sector. The Supreme Court notes the importance of free speech in every case involving compulsory union membership in both the public and private sector. In Locke v. Karass , a case specifically relied on by the Board in its Kent Hospital decision, the Court addresses the importance of the First Amendment in the agency shop relationship. Locke v. Karass, 555 U.S. 207, 213 (2009). The First Amendment permits the government to require **"both public sector and private sector employees** who do not wish to join a union designated as their exclusive collective bargaining representative at their unit of employment to pay that union a service fee as a condition of their continued employment" (emphasis added). Locke, 555 U.S. at 213. The union may not charge the nonmember for certain activities, such as political or ideological activities, with which the nonmembers may disagree. The local can charge nonmembers for activities more directly related to collective bargaining. "In such instances, the Court has determined that the First Amendment burdens accompanying the payment required are justified by the government's interest in preventing free riding by nonmembers who benefit from the union's collective bargaining activities and in maintaining peaceful labor relations." Id. (citations omitted). The Board cannot choose to apply part of the Court's analysis, while ignoring the most important aspect, the objecting employees' constitutional rights.

In Lehnert v. Ferris Faculty Association, the Court reviewed the First Amendment aspects of union security provisions under the RLA and applied those principles to the public sector. Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991). Unions traditionally have aligned themselves with a wide range of social, political and ideological viewpoints, any number of which might bring vigorous disapproval from individual employees. To force individuals to contribute, even indirectly, to the promotion of such positions implicates core First Amendment

concerns. Lehnert, 500 U.S. at 516. Expenses that are relevant, or "germane," to the collective bargaining functions of the union will generally be constitutionally chargeable to dissenting employees. "At least in the **private sector**, those functions do not include political or ideological activities." Id. (emphasis added). If assessments are imposed for a purpose not germane to collective bargaining, First Amendment values may be offended. The Court's approval of the statutorily sanctioned agreement did not extend to compelled membership used as a cover for forcing ideological conformity in contravention of the First Amendment. Lehnert, 500 U.S. at 515 (citing Railway Employees v. Hanson, 351 U.S. 225, 238 (1956)). Under these cases, the Board cannot extend agency fees into the political arena without triggering the protections of the First Amendment. The Board's decision to ignore the constitutional principles inherent in the union shop relationship contravenes Supreme Court precedent.

The Board overstepped its authority by ignoring settled constitutional law in the area of objector's rights. Although the Board rests its decision on the union's duty of fair representation, rather than looking to the constitutional issue, the Supreme Court has already determined that the duty of fair representation prohibits unions from charging objecting nonmembers for political purposes. The issue is one for federal courts, not a decision by the Board. The Board retains primary jurisdiction over the unfair labor practice charge. However, federal courts retain jurisdiction over the judicially implied duty of fair representation and constitutional challenges. Beck, 485 U.S. at 744 (citing Vaca v. Snipes, 386 U.S. 171, 177 (1967)). The Board lacks jurisdiction to determine the constitutionality of the Act. Id. at 744, n.1. The NAM respectfully requests that the Board withdraw or overturn its Kent Hospital decision because it erred by ignoring the constitutional issue of compelling objecting nonmembers to financially support the union's political activities.

III. THE BURDEN OF REQUIRING EMPLOYEES TO OPT OUT OF NONREPRESENTATIONAL EXPENSES IS TOO HIGH UNDER THE FIRST AMENDMENT. UNIONS SHOULD NOT BE PERMITTED TO COLLECT ANY FEES FOR LOBBYING, OR OTHER PURPOSES UNRELATED TO COLLECTIVE BARGAINING, UNLESS AN EMPLOYEE OPTS IN ON AN ANNUAL BASIS.

The First Amendment rights of all employees, not just objecting nonmembers, need to be protected. No employees should be compelled by the government to finance unions' political speech. The current scheme, requiring employees to object and opt out, and leaving the decision to the union regarding the appropriate amount to deduct for its own political purposes, gives the union the "extraordinary" benefit of being empowered to automatically compel nonmembers to pay for services they may not want and have not agreed to fund. *See* , Knox v. Service Employees International Union, Local 1000, 567 U.S. ____ (2012) slip op. at p. 21. The focus should be on protecting employees' constitutional rights, not on facilitating the union's collection of political fees.

In Knox, the Court analyzed the connection between the First Amendment and any mandatory association.[2] The First Amendment creates an open marketplace where differing ideas about political, economic and social issues can compete freely without government interference. The government cannot compel the endorsement of ideas that it approves, or prohibit the dissemination of ideas that it disfavors. Closely related to compelled speech and compelled association is the compelled funding of other private speakers' or groups' speech. Knox, at slip op. p. 9 (citations omitted). To compel employees to financially support their collective bargaining representative necessarily impacts their First Amendment interests.

Compulsory subsidies for private speech are subject to exacting First Amendment scrutiny. For strict scrutiny to apply, there must be a comprehensive regulatory scheme

[2] Although Knox involved public employee unions, the Court analyzed private "mandatory associations" in its decision.

involving a mandatory association. When a mandatory association exists, compulsory fees can only be levied as far as they are a necessary or incident of the larger regulatory purpose that justified the required association. Knox, at slip op. p. 10. The primary purpose of permitting a union to collect fees from nonmembers is to prevent nonmembers from "free riding" on the union's efforts without paying the costs incurred. "A nonmember cannot be forced to fund a union's political or ideological activities." Knox, at slip op. p. 11. Clearly, the Supreme Court never intended agency fees to reach to a union's lobbying activities for any employees.

The NLRA triggers the First Amendment because the statute creates a regulatory scheme compelling employees to pay dues to an association, the union, as a condition of their continued employment. Knox, at slip op. pp. 10-11. Compelling association necessarily infringes on the employees' First Amendment rights, no matter whether the NLRA, RLA, or other public sector agency shop statute applies. The regulatory purpose of the agency shop is to prevent "free riders." The only restrictions allowed on free speech are those supporting this regulatory purpose. It is a violation of the First Amendment for the union to use service fees, collected pursuant to an agency shop provision, for political and ideological purposes to which the employee objected. Aboud, 431 U.S. at 231. The Board's test, declaring lobbying expenses per se related to collective bargaining, completely ignores the fundamental free speech disparity of the agency shop relationship. The connection between lobbying and eliminating "free riders" in the collective bargaining relationship is tenuous. The Board's decision to allow unions to charge objectors lobbying expenses is an overly broad restriction on those employees' free speech.

Compelling dues collection for lobbying expenses impacts more than the First Amendment concerns of objecting employees. "The general rule – individuals should not be

compelled to subsidize private groups or private speech –should prevail." Knox, slip op. at p. 22. The focus should be on whether any employee, not just objecting employees, in an agency shop may be compelled to contribute money to the union's nonrepresentational activities. Political activities fall outside the bargaining context. Lehnert, 500 U.S. at 521. Since lobbying falls well outside the scope of collective bargaining concerns, allowing any automatic collection of union dues for political purposes clearly violates the First Amendment. The Union possesses no constitutional right to the members' dues. Knox slip op. at p. 21. The Knox Court suggests that the only supportable scheme under the First Amendment is an "opt in scheme when annual dues are billed."

Congress erected a statutory scheme creating the agency shop. This scheme passes First Amendment scrutiny because it furthers the regulatory scheme of prohibiting free riders in the collective bargaining relationship and fostering labor relations peace. Allowing the union to automatically compel members to pay dues outside fees within the financial core is completely unrelated to the purposes of collective bargaining. The current structure of allowing unions to collect fees for political purposes, unless an employee objects and opts out, essentially violates the First Amendment rights of all 14.4 million union members in the United States. U.S. Department of Labor Statistics, Bureau of Labor Statistics, *Union Members Summary* (2013). This structure gives almost complete control over the employees' First Amendment speech to the very mandatory association the government compels them to join. Current opt out procedures provide very little protection from the union's prohibited use of fees. Individuals must bear a significant burden to opt out, find reliable information about the union's nonrepresentational activities, and enforce their rights through the Board of court processes. Accordingly, the First

Amendment dictates that the employee should not have to bear the burden of opting out, and objecting, to avoid supporting the union's political speech.

IV. THE BOARD FURTHER ERODED OBJECTING EMPLOYEES' BECK RIGHTS BY CREATING AN EVIDENTIARY PRESUMPTION IN FAVOR OF LOBBYING CHARGEABILITY.

The determination of whether union expenses are chargeable is unsuitable for an evidentiary presumption. The Supreme Court's "decisions in this area prescribe a case-by-case analysis in determining which activities a union constitutionally may charge to dissenting employees . . . ." Lehnert, 500 U.S. at 519. The chargeable activities must: (1) be germane to collective bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders" and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop. Lehnert 500 U.S. at 519; Chicago Teachers Union Local 1 v. Hudson, 475 U.S. 292, 306 (1986); Railway Clerks v. Allen, 373 U.S. at 122. No presumption can apply. The Board must apply a case-by-case analysis to determine whether expenses are chargeable.

The Board's presumption of the chargeability of lobbying fees ignores relevant Supreme Court precedent regarding the "germaneness" of lobbying fees. The Supreme Court created a bright line rule prohibiting unions from compelling objectors to contribute to political causes. Beck clearly held that "Congress did not intend to provide the unions with a means for forcing employees, over their objection, to support political causes which they oppose. " Beck, 487 U.S. at 751. In fact, the Court has always noted the important difference between the union's authority to "engage in collective bargaining and related activities on behalf of nonmember employees in a bargaining unit and the union's use of nonmembers' money to support candidates for public office or to support political causes which they oppose." Knox, 567 U.S. ___ (slip op.

at 20) (citing Machinists v. Street, 367 U.S. 740.)[3] "In the private sector, those functions do not include political or ideological activities." Lehnert, 500 U.S. at 516. Funds used to defeat perceived anti-union initiatives, elect sympathetic political officials, and conduct lobbying activities are not "germane" to the union's function as a bargaining representative and not chargeable to objecting nonmembers. Knox, slip op. at 1(Sotomayor, J., concurring).

A presumption of germaneness unfairly shifts the burden of proof to objecting employees to show the union's lobbying expense is unrelated to collective bargaining, contract administration or grievance adjustment. This holding contradicts established precedent. The union always bears the burden of proving that an expense is validly chargeable to its members. California Saw, 320 NLRB at 242; Lehnert, 500 U.S. at 524. The Board creates a presumption in favor of certain lobbying activities because the Board finds those activities so closely linked to the union's representational functions that it would directly affect subjects of collective bargaining. Courts already rejected this approach to lobbying. A subject is not made germane simply because it is a subject of collective bargaining. Miller, 108 F.3d at 1423. The Board's interpretation of the duty of fair representation and constitutional issues is not rational or consistent with the purposes of the NLRA or the First Amendment.

The Board identified several areas where the presumption should apply. Lobbying for or against minimum wage legislation, professional licensing and certification, legislation affecting employees represented by the union and State supplements to the Worker Adjustment and Retraining Notification (WARN) Act "might be types of lobbying expenses that would reasonably be treated as presumptively germane and thus chargeable." Kent Hospital, 359 NLRB No. 42, slip op. at 9.

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[3] Communications Workers of America v. Beck, 485 U.S. 735, 739 (1988) also finds Machinists v. Street, 367 U.S. 740 (1961) controlling for issues under § 8(a)(3) of the NLRA.

The Board ignores federal precedent specifically holding that these subjects are not germane. When challenged lobbying activities relate to financial support of the employee's profession, or public relations expenditures to enhance the reputation of a profession, the connection to the union's function as bargaining representative is too attenuated. The public relations activities were akin to political speech. Lehnert, at 520, 528. Similarly, union lobbying for safety, increased minimum wage laws, or heightened governmental regulation of pensions are not germane. Miller, 108 F.3d at 1422, 1423 (citations omitted). The Board continues to ignore the established precedent in an effort to support union lobbying expenses over the objections of dissenting nonmembers.

As discussed above, the Board's presumption unreasonably burdens the dissenting employees' free speech. Under the Board's approach, the union could easily link any lobbying expense back to wages and terms and conditions of employment. The objecting nonmember must then prove the expense was unrelated. The employee has no access to the financial records or the internal union information necessary to meet this evidentiary burden.

Union security agreements are justified by the government's interest in promoting labor peace and avoiding the "free rider" problem. Neither goal is served by charging objecting employees for lobbying, electoral or other political activities that do not relate to their collective bargaining agreement. Because worker and union cannot be said to speak with one voice, it would not further harmonious industrial relations to compel objecting employees to finance union political activities. Lehnert, 500 U.S. at 521. Most importantly, allowing the use of dissenters' assessments for political activities outside the scope of the collective bargaining context would present additional interference with First Amendment interests of objecting employees. Lehnert at 521 (citing Ellis, 466 U.S. at 456). The Board's presumption allows the

union to overtly charge political activity back to objecting members, without even a basic evidentiary showing of chargeability, and completely undermines the Supreme Court's basic holding in Beck.

V. THE BOARD FURTHER INFRINGES ON DISSENTING EMPLOYEES' RIGHTS BY CREATING A NEW OBLIGATION TO FUND NATIONWIDE UNION LOBBYING OVER THE EMPLOYEE'S OBJECTIONS.

In Kent Hospital, the Board infringed even further on dissenting employees' Beck rights by requiring them to pay extra-unit, or nationwide, lobbying expenses. The union charged dissenting employees for several out-of-state lobbying campaigns. No dispute existed that the lobbying campaigns provided no direct benefit to the members of the Kent Hospital unit. The Board allows a union to charge objectors for extra-unit lobbying expenses as long as they are for "services that may ultimately inure to the benefit of members of the local union by virtue of their membership in the parent organization." The union makes this showing when the charge was reciprocal in nature. Kent Hospital, 359 NLRB No. 42, slip. op. at 8, *quoting* California Saw, 320 NLRB at 239. Although the Board calls the expenses "extra-unit," it essentially creates a system of nationwide lobbying.

The Board stretches the reasoning of relevant precedent to construct its new rule. A local bargaining representative may charge objecting employees for their pro rata share of costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit. Part of the local's affiliation fee to the national contributes to the pool of resources potentially available to the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year. Lehnert v. Ferris Faculty Ass'n, 500 U.S. at 522 (citing Ellis v.

Railway Clerks, 466 U.S. at 448). This pool of resources does not give the local union carte blanche. The union bears the burden of proving the proportion of chargeable expenses to total expenses. Id. at 522-524.

In its decision, The Board erred in applying the first step of the test. Before a determination can be made on extra-unit lobbying expenses, the union must establish that the expense is chargeable to objecting nonmembers. The Supreme Court specifically found that expenses related to political expenditures are not chargeable. Locke v. Karass , 555 U.S. at 210 (citing Elllis v. Railway Clerks, 466 U.S. 435 (1984) and Machinists v. Street, 367 U.S. 740 (1961)). Locke involved national pooling of resources to cover litigation expenses. The Board relies on Locke to expand dues pooling from litigation to lobbying expenses. The central problem with the Board's reasoning is that lobbying is not a chargeable expense. Locke, the case relied on by the Board to support national pooling, explicitly restricts chargeable litigation expenses to those not related to political activities. Locke, 555 U.S. at 211. The Board ignores all contrary precedent to support the union's nationwide lobbying scheme.

The Board compares the pooling of money for lobbying to a litigation insurance scheme that benefits the local unions. Litigation and lobbying are inherently different. Litigation involves the right to pursue or defend claims in a court of law. The local contributes to a national pool to insure itself against future lawsuits. Lobbying is fundamentally ideological and political. The union attempts to influence a governmental body, not insure against a future liability. The Board cannot force the objecting employee to contribute money to support political causes, on a local, multi-state, or national level, that the employee disagrees with. Inherently political activities are not chargeable on any level. By ignoring this critical distinction, the Board

essentially creates a new obligation that all employees, member and nonmember, fund the union's nationwide lobbying efforts.

VI. THE BOARD SHOULD INSTITUTE MORE STRINGENT PROCEDURAL STANDARDS AND NOTICE REQUIREMENTS TO PROTECT THE NON-MEMBERS' RIGHTS TO OBJECT.

In Kent Hospital, the Board found that the union did not violate its duty of fair representation by failing to provide the objector with a verified audit letter. Beck objectors have a right to accurate information regarding the union's non-chargeable expenses. Once an employee objects to paying dues for nonrepresentational activities, and seeks a reduction in fees, the union must provide information sufficient to enable objectors to determine whether to challenge the union's dues reduction calculations. California Saw & Knife Works, 320 NLRB 224, 239 (1995), *enforced sub nom.* Machinists v. N.L.R.B., 133 F.3d 1012 (7th Cir. 1998).

The Board consistently requires unions to provide accurate information to bargaining unit employees. Before a union seeks to obligate an employee to pay fees and dues under a union security clause, the union must inform the employee that the employee has a right to remain a nonmember, and that nonmembers have the right to: (1) object to paying for union activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities; (2) be given sufficient information to enable the employee to intelligently decide whether to object; and (3) to be apprised of any internal union procedures for filing objections. If the employee chooses to object, he or she must be apprised of the percentage of the reduction, the basis for the calculation and the right to challenge these figures. The union's breakdown of expenditures must be verified by an audit. California Saw, 320 NLRB at 233. The audit includes "a service performed by which an accountant undertakes an independent verification of

selected transactions within the major categories of financial information presented in the accountant's report. The accountant then issues a report accompanied by an opinion letter certifying that, in the accountant's opinion, the report presents fairly, in all material respects, the financial information that was the subject of the audit." Televisions Artists, AFTRA (KGW Radio), 327 NLRB 474, 477 (1999).

The Board applies the principles found in Chicago Teachers Union Local 1 v. Hudson, to the NLRA in the area of procedural protections accorded to Beck objectors.[4] Chicago Teachers Union Local 1 v. Hudson, 475 U.S. 292 (1986). The same "basic consideration of fairness" necessarily extends to a union's notice to nonmembers of their right to object to payment of nonrepresentational expenses. California Saw, 320 NLRB at 233 n. 50. Although the governmental interest in labor peace is strong enough to support an "agency shop," notwithstanding its infringement on employees' constitutional rights, the fact that those rights are protected by the First Amendment requires the procedure to be carefully tailored to minimize the infringement. The individual whose First Amendment rights are being affected must have a fair opportunity to identify the impact of the action on his interests to assert a meritorious First Amendment claim. Hudson, 475 U.S. at 303. The union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used to finance ideological activities unrelated to collective bargaining. The amount at stake for each dissenter does not diminish this concern. Hudson, 475 U.S. at 304.

The federal courts agree that any rational interpretation of the duty of fair representation under the National Labor Relations Act would necessarily include an independent auditor requirement. The NLRA's duty of fair representation is guided by the standards in Hudson. Ferriso v. N.L.R.B. , 125 F.3d 865 (D.C. Cir. 1997). The constitutional requirements for the

[4] Chicago Teachers Union Local 1 v. Hudson, 475 U.S. 292 (1986), involves public sector unions.

union's collection of agency fees include an adequate explanation of the basis of the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker and an escrow for the amounts reasonably in dispute while such challenges are pending. Hudson , 475 U.S. at 310. The nonunion employee has the burden of raising the objection, but the union retains the burden of proof. Since the union possesses the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, "basic considerations of fairness" compel that the union, not the individual, bear the burden of proving such proportion. Hudson, 475 U.S. at 306.

The Knox decision suggests that the Supreme Court may be moving toward an even stricter procedural standard for agency fees. *See* Knox v. Service Employees International Union, Local 1000, 567 U.S. ___ (2012). The primary purpose of permitting unions to collect fees from nonmembers is to prevent nonmembers from "free riding" on the union's efforts and to share the costs incurred. A nonmember cannot be forced to fund a union's political or ideological activities. The Court noted the question is how much of a burden we place on the nonmember to opt out of making that payment. A union should not be permitted to exact a service fee from nonmembers without first establishing a procedure to avoid the risk that their funds will be used to fund ideological activities unrelated to collective bargaining. Unions have no constitutional entitlement to the fees of nonmember employees. Any procedure for exacting fees must be carefully tailored to minimize the infringement of free speech rights. Measures must not be significantly broader that necessary to serve that interest. Requiring members to opt out approaches, and may cross, the limits of the First Amendment. Knox, slip op. at 13.

The Court concluded the side that should bear the burden is "the side whose constitutional rights are not at stake." Id. at 21. If non-consenting members pay too much, their

First Amendment rights are infringed. If non-consenting members pay less than their proportional share, no constitutional right of the union is violated because the union has no constitutional right to receive payment from these employees. Requiring nonmembers to opt out when annual dues are billed already substantially impinges on the First Amendment rights of nonmembers. The general rule prevails. "Individuals should not be compelled to subsidize private groups or private speech" Id. at 22 .

If a union uses nonmember dues to support a political candidate the employee may not endorse, the nonmember's First Amendment rights are forever infringed if, after the candidate wins the election, the union is required to justify the expense. The Board's approach to this issue will result in such First Amendment deprivations at the expense of nonmembers in favor of unions time and time again.

Even with a Hudson notice, the auditor takes the union's view of what is chargeable. If the union takes a broad view of what is chargeable, for example supporting sympathetic political candidates, the auditors will classify these political expenditures as chargeable. The onus is on the employee to mount a legal challenge in a timely fashion. This is already a "significant burden" for employees to bear simply to avoid having their money taken to subsidize speech with which they disagree. Id.

The Board should strive to ensure that its procedures do not unfairly compel the dissenting nonmembers to subsidize the union's political activities. At a bare minimum, the Charging Party is entitled to a copy of an audit verification letter certifying the union's expenses were actually incurred. The independent verification is essential to the nonmember determining whether their funds will be used to fund ideological activities unrelated to collective bargaining.

The NAM urges the Board to adopt the notice requirements of Cummings v. California State Employees Assoc., Local 1000, 316 F.3d 886 (9th Cir. 2003).

In Cummings, the Ninth Circuit found that Hudson required the union to provide objectors with a statement of its chargeable and non-chargeable expenses, along with an independent verification that the expenses were actually incurred. The purpose of Hudson is to allow members to gauge the propriety of the union's fee. If the union contends that the relevant figures were lifted from an audited financial statement, the notice should include a certification from the independent auditor that the summarized figures have been audited and have been correctly reproduced from the audited report. Cummings, 316 F.3d at 892. If the union must perform some additional calculations to provide the adequate notice to nonmembers, then the certification may need to be more detailed and confirm the local union has performed the mathematical adjustments correctly. Cummings, 316 F.3d at 892 n.1.

The NAM urges the Board to take further steps to protect the dissenting employees' First Amendment rights. Currently, the union must only give employees notice of their Beck rights at the time the union seeks to obligate the nonmember under a union security agreement, or when the employee enters the bargaining unit. The union has no further obligation unless the employee objects to paying the nonrepresentational portion of the dues. Recognizing the burden on the employee, the Board should take an additional step of requiring the union to provide all employees with a verified audit of its chargeable expenses on an annual basis. That notice would need to be updated any time the union makes a special assessment or changes the union dues. *See* Knox, slip op. at 17. The employee would then have the option of opting in for the portion of dues allocated to nonrepresentational functions. If they choose not to opt in, the union has no right to collect that portion of the fee.

The burden of requiring the union to supply periodic written verification is minimal. Labor organizations with $250,000 in receipts must file an annual financial report with the U.S. Department of Labor. 29 U.S.C. § 431. The Board already requires the union to verify a breakdown of its expenditures through an audit and audit verification. California Saw, 320 NLRB 224 (1995). The union clearly will incur no additional cost in providing the objecting employees with a copy of the independent verification of their costs.

The corresponding burden on the employee of trying to obtain reliable and certified information from the union is considerable. The burden rests on employees to object to the payment of nonrepresentational expenses before they are entitled to any union financial information. Under the Board's Kent Hospital decision, the employee is not even assured that the information has been independently verified. No other avenues exist to obtain the information. In fact, in the underlying case, the Charging Party requested subpoenas to discover exactly this financial information from the union. The Board affirmed the Administrative Law Judge's decision to revoke the subpoenas stating that the "proffered evidence was simply not relevant to the complaint." Kent Hospital, 359 NLRB No. 42, slip op. at 2 n.4. All employees should be able to review the Union's information on an annual basis in order to make an informed decision about their union membership whether they want to object to nonrepresentational expenses. The First Amendment dictates that the Board and the Courts create a process that minimizes the restrictions on employees' free speech rights. The current process of requiring employees to opt out of the union's lobbying scheme places an unfair burden on the party whose constitutional rights are affected.

CONCLUSION

The NAM respectfully requests that the Board overturn or set aside its decision in Kent Hospital, and refuse to issue a supplementary decision, on the basis that it lacks legal quorum and the decision is contrary to the clear meaning of the National Labor Relations Act, the union's duty of fair representation and the First Amendment of the United States Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the *Amicus Curiae* Brief was electronically filed via the NLRB website on February 19, 2013. A copy of the foregoing was sent via e-mail to Don Firenze, Counsel for the Acting General Counsel (Don.Firenze@nlrb.gov) and to Chris Callaci, Counsel for the UNAP, (ccallaci@unap.org) and Matthew C. Muggeridge, Staff Attorney (mcm@nrtw.org) and mailed by US mail, first-class, postage prepaid, to Jeanette Geary, P.O. Box 216, 479 Spring St., #1, Newport, RI 02840.

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